Maastricht University

Conflict or concord?

Citation for published version (APA):

Sabharwal, P. (2022). Conflict or concord? The jurisprudential response of the National Constitutional Courts of Germany, France and the United Kingdom to the Primacy Doctrine of the Court of Justice of the European Union from 2005 to 2015 – and the lessons to be learnt. [Doctoral Thesis, Maastricht University]. Maastricht University. https://doi.org/10.26481/dis.20220202ps

Document status and date:
Published: 01/01/2022

DOI:
10.26481/dis.20220202ps

Document Version:
Publisher's PDF, also known as Version of record

Please check the document version of this publication:

• A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.

Link to publication

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Download date: 26 Apr. 2024

IMPACT PARAGRAPH

In accordance with Article 22 of the *Regulations for obtaining the doctoral degree* of Maastricht University (in effect since 1 October 2020), it is incumbent upon the doctoral candidate to write an impact paragraph on the anticipated scientific impact of the results of the research described in the thesis, as well as any prospective social impacts. Article 22 outlines questions that are to guide the doctoral candidate in explaining the academic import of the thesis.

Objectives of the Research and Contribution to Science

In line with the research question, the dissertation pursued two objectives. First, to understand the responses of the national constitutional and supreme courts of Germany, the United Kingdom and France to the primacy doctrine articulated by the Court of Justice first articulated in its early jurisprudence. Specifically, the thesis examined cases from the Federal Constitutional Court (Germany), the Supreme Court (United Kingdom) and the Constitutional Council (France) in the 2005-2015 period for clues of potential defiance, resistance or acceptance of the primacy doctrine. In this regard, it is important to emphasize that the enquiry carried out in this doctoral thesis extended to both the acceptance/rejection of the primacy of EU law *in principle* and (provided such acceptance in principle was indeed forthcoming by the respective national constitutional/supreme court) the scope of the jurisprudential acceptance by the court in question.

Going beyond the characterization of the jurisprudential responses of the three courts, another important aspect that the thesis sought to consider the scope for changes to the operation of the relationship between the Court of Justice of the European Union, as well as its national (constitutional) interlocutors. The thesis also seeks to examine the relationships within the multilevel constitutional order of the European Union from the vantage point of coexistence of different claims of authority posited by the Court of Justice and the national constitutional courts of the Member States – and also explores a theoretical perspective which could enable an accommodation of the two. Finally, another (albeit ancillary) objective was to contextualize and contrast the primacy doctrine enunciated by the Court of Justice with the supremacy doctrines of federal countries. Overall, the thesis combines elements of comparative (constitutional) law, case law analysis, legal theory and (comparative) legal history.

In the author's view, the research underpinning the dissertation and the results generated by it will further discussion about the principle of primacy, especially its viability and legitimacy in a modern European Union, as well as the possibility for reforms to strengthen its operational value in a union that has faced multiple challenges (including from within) – particularly as the issue of primacy (especially *because* of its constitutional nature) is relevant to every single EU citizen.

In this context, three broad themes of the research can be distilled:

Conflict: The dissertation enquired about the existence of a conflict between the Court of Justice and the national constitutional courts of the European Union (taking the (quasi-) constitutional courts of Germany, the United Kingdom (given that the period primarily covered in the dissertation still saw the country as a member of the European Union) and France. Ancillary to this enquiry, the book also sought to understand the scope of any existing conflict and how it impacted the day-to-day jurisprudence of the national constitutional courts within the 2005-2015 period. The dissertation concluded that whilst there is no systemic conflict imminently threatening the existence of the EU's legal system, there are several faultlines that have become apparent in the interactions between the Court of Justice and its national interlocutors over the past decade. These faultlines (caused by reliance on good faith on part of all relevant stakeholders, as well as competing claims to authority) have the potential to severely disrupt the functioning of the EU legal order and, by extension, threaten the viability of the European Union itself. This risk is only exacerbated by recent political developments in the European Union itself. All three national

constitutional courts examined have exhibited resistance to the primacy doctrine enunciated by the Court of Justice of the European Union at various times.

Solutions: Further, apart from the existence of a conflict between the Court of Justice and its national interlocutors, the dissertation also examined the potential for constructive solutions that can alleviate the risk of emerging faultlines that may threaten the viability of the EU legal order. A series of recommendations are made in order to improve the interactions of the different courts within the wider EU legal system.

Theory: Finally, the dissertation also makes an effort in terms of combining diverse strands of law, such as comparative (constitutional) law, EU law, various theories of constitutional law (constitutional pluralism and democratic statism, to name two) and different types of jurisprudence relevant to the interactions of the four jurisdictions in question (Germany, France, United Kingdom and the European Union) during the relevant period under review. It also contextualizes the issue of primacy as part of the wider debate on the EU's democratic credentials and further addresses its relevance to the rule of law challenges faced by the Union.

Innovative Character
The topics of primacy and judicial dialogue have been covered by leading academics over the decades, ever since the inception of the process of European integration. Consequently, you, the reader, may be inclined to wonder why another book is needed on this particular aspect of European law. This is a perfectly legitimate question which deserves an answer: first, the research innovates on the existing knowledge on the issue of primacy by providing a much more comprehensive examination of the case law of the national constitutional courts concerned, namely in terms of the coverage of a breadth of fields of law, the time period examined and the depth with which the cases are reviewed.

Second, the research presents an innovation, as it takes a broader view of the case law of the past decade and it also considers the latest developments (especially on the heels of the CJEU's Weiss judgment and the FCC's historic ultra vires decision on 5 May 2020). By their nature, many analyses of cases or lines of cases are written shortly after seminal judgments are handed down by the respective courts and reflected upon in academic journals. For practical reasons, authors cannot engage in very in-depth analyses of more than one or two cases. While there certainly are monographs on lines of cases heard by the CJEU, these are frequently written with a view to analysing developments in a particular legal field, looking at the effects of the Court of Justice's jurisprudence on the development of policies pursued by the European Union or reviewing the methodology of the Court of Justice itself. In contrast, there are no contemporary monographs presenting and comparing the jurisprudence of the three selected national (constitutional) courts, specifically viewed through the prism of the adherence to the principle of the primacy of EU law, in the English language.

Third, while many academic contributions focus on the interactions of national courts, as a collective, with the Court of Justice (without regard to national hierarchies, from the lowest to the highest courts) or the interaction of one particular national constitutional court (usually the Federal Constitutional Court in Germany) or the interactions of national courts in one particular field of European Union law, few systematic examinations of the relationships of the national constitutional courts of Western European countries like Germany, France and the United Kingdom with the Court of Justice have been carried out. Indeed, as Stone Sweet affirms, until the beginning of the 1990s, there were barely any analyses of the French Constitutional Council's operation by French scholars. Likewise, an initial review of the relevant literature on the approach taken by the United Kingdom's highest courts reveals sparse discussions on the issue of primacy

and the adherence of the UK Supreme Court/House of Lords to it. Essentially, after the case of *Factortame v Secretary of State for Transport (No 2)*, the reviewed literature usually assumes that the UK courts have generally accepted the primacy of EU law. However, it appears that (at least recently) there has been no examination of the compliance of the UK Supreme Court and the House of Lords Judicial Committee with the primacy doctrine outside the context of Factortame. For understandable reasons, much of the recent research efforts in the field of European judicial relations have been focused on the supreme courts of the Eastern European Member States that acceded in 2004, 2007 and 2013. This focus appears even more pertinent in light of the ongoing rule-of-law crisis within the European Union, most notably in Hungary and Poland. Finally, given the recent spate of high-profile qualifications and limitations placed upon the primacy of EU law by several national highest courts, especially the recent decision of the Federal Constitutional Court (FCC) in *Weiss*, as well as several attempts by the CJEU to aggressively police its interpretative monopoly, an examination of the acceptance of the primacy doctrine appears even more urgent.

Audience for this Dissertation
The research results are interesting and relevant to several groups, in different permutations.

Primarily, the research results will be interesting to scholars in the field of constitutional law (in all its facets), to whom the issue of the (claimed) primacy of European Union law (as well as the level of respect and compliance accorded to it by the constitutional courts of the member states of the European Union) and the tensions it engenders vis-à-vis the legal claims of the national constitutions of the individual Member States. Considering the fact that the doctrine of the primacy of European Union law essentially forms the foundation for the acceptance of all legal acts of the European Union by the respective Member States, the results of the thesis will (at the very least) be of auxiliary interest to scholars in other fields of European Union law as well.

Considering their implications for the effective operation and viability of European Union law, the research results presented in the doctoral thesis are also of interest for others engaged in academic research in the area of European Union law. Further, the perspectives furnished by the research results of this book will also be of use to active practitioners of European constitutional law. Branching out beyond the confines of scholarship at universities and legal practice before higher courts, the primacy doctrine has also informed reflections among policymakers, researchers in think tanks, journalists and elected officials.

The salience of research on issues of (comparative) constitutional law is further underlined by the frequent occasions on which academics are requested to provide their analyses on select issues, for instance in reports, testimonies before parliamentary committees and policy papers. Furthermore, the relationship between the Court of Justice and the national constitutional courts of the European Union is also of general interest to the wider public – especially in light of the vigorous debates in several Member States about the appropriate balance to be struck between the exigencies of fulfilling the objectives of the European Union treaties and the prerogatives ordained by the national sovereignty of the several Member States. Through its far-reaching effects, the doctrine of primacy enunciated by the Court of Justice, as well as the contestation of that doctrine by various national constitutional and supreme courts across the European Union, has effects on the lives of all European Union citizens – regardless of whether the latter are deeply aware of the intricacies of EU law or not.

Overall, especially once the research results have been transposed into different types of output, they will hopefully have the potential to contribute to the engaged discussion on the future direction and destination of the European Union.

Implementation

Considering that the research underpinning this book is scholarly in nature, the involvement and information of the different stakeholders can be accomplished through different pathways. First, the thesis can be transposed into a monograph, whose audience would primarily be a specialist audience (university academics, researchers, policymakers, elected officials, journalists, experts in non-governmental organizations), but which would aspire to be accessible to a broader, generalist audience as well. Second, scholarly discussion can be furthered through the publication of journal articles and conference papers based on or derived from this dissertation. Third, the dissertation also offers an opening to contribute to the public discussion through opinion pieces in the media (whether through classical or new avenues). Fourth, through the aforementioned pathways, the dissertation also offers the scope for engagement through conferences, seminars and symposia, as well as presentations. Last, but not least, the research underpinning this particular book can be used as a starting point for further monitoring and scrutiny of the relationship between the Court of Justice and the national constitutional courts of the individual Member States – whether through the analysis of individual judgments or the holistic examination of trendlines.